MASTER AND SERVANT—CONSTITUTIONALITY OF A LAW PROHIBITING EMPLOYER FROM CONTRACTING WITH EMPLOYEE THAT THE LATTER SHALL WITHDRAW FROM A LABOR UNION—In *State* v. *Coppage*,[1] such a statute[2] was declared valid, and as the case is contrary to all previous cases upon the point, a study of those cases and of the conditions leading to the passage of such a statute may bring forth reasons for sustaining it.

After the Civil War the power of the masters of the large industries which slowly began to develop, to dictate any terms of employment, and the helplessness of the individual laborer because of economic pressure, impelled the laboring classes of the country to adopt means to enable them to meet the employers upon an equal footing. Labor organizations of all kinds, strikes, and boycotts were the result, and to repel this advance the masters adopted the blacklist of employees, and employers associations, and discharged or refused to employ laborers who were connected with labor organizations. Legislation to restrict the powers of the master class and thus indirectly aid the weaker class and also to avert the frequent clashes between them with the usual destruction of life and property seemed indispensible.

Statutes providing that it was unlawful for an employer to discharge an employee because he was a member of a labor organization were passed and were in every case held unconstitutional.[3] The ground of those decisions is that by the constitutional guaranty of life, liberty and property, an employer has the right to discharge an employee with or without cause, subject only to a civil action for damages in a proper case, and the employee has the corresponding right to labor or to refuse to labor for another. Judge Cooley said: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice."[4]

Statutes which require an employer to give the reason or cause of dismissal have been held invalid on the ground that "the liberty to remain silent is correlative with the freedom to speak."[5]

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[1] 125 Pac. Rep. 8 (Kan., 1912).

[2] Gen. Stat. of 1909 sections 4674 and 4675; the former section reading, "That it shall be unlawful for any (employer) to coerce, require, demand or influence any person or persons to enter into any agreement, either written or oral, not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in the employment of such (employer)."

[3] State v. Kreutzberg, 114 Wis. 530 (1902); Brick Co. v. Perry, 69 Kan. 297 (1904); Adair v. U. S., 208 U. S. 161 (1908).

[4] Cooley on Torts, 1st. ed. p. 278; 2nd. ed. p. 328. The passage quoted is cited with approval in each of the cases in note 3 (*supra*).

[5] Quoted from Atchison, etc. Ry. v. Brown, 80 Kan. 312 (1909). Wallace v. Georgia Ry. Co., 94 Ga. 732 (1894); N. Y. R. R. Co. v. Schaffer, 65 Ohio St. 414 (1901), accord. A statute making it a misdemeanor for any person who has contracted in writing to serve another for any given time, to quit in breach of said contract and to make a second contract of similar nature with another person, without giving the second employer notice of the existence of the first contract, was held unconstitutional in Toney v. State, 141 Ala. 120 (1904).

Statutes providing that it shall be unlawful for an employer to coerce or require any person to enter into an agreement not to become or remain a member of any labor union, as a condition of that person securing employment or continuing in the employment of such employer, have been held unconstitutional in every decided case except the principal case. *State* v. *Julow*[6] is a leading case; it held that the statute of Missouri was unconstitutional because it made that a crime which was the exercise of a constitutional right, to wit, the termination of a contract, and also because the statute did not tend to promote the public health, welfare, comfort or safety—a characteristic essential to an exercise of the police power. These two reasons are given in all the decisions in accord with that case.[7]

It may be conceded that a state legislature may designate as a crime any act the commission of which tends to injure the safety, health or moral and general welfare of the public; if the coercion of an employee by his employer, in the opinion of the legislature, is against public policy because of such injurious tendency upon the public, it would logically follow that a statute, which made such coercion a crime, would be perfectly valid. The principal case alone goes to that extent. The courts have taken different views as to the effect to be given to the words "coerce or compel" in the statutes, and as to whether an employer does coerce an employee by a threat of discharge. One court[8] held that "the words 'coerce or compel' were not intended to refer to physical violence or interference with the person of the employee . . . The mandate of the statute is the substantial equivalent of an enactment that a person shall not make the employment, or the continuance of an employment, of a person conditional upon the employee not joining or becoming a member of a labor organization." Another court[9] held that "the words 'coerce' and 'attempt to coerce' are to be considered as the mere statutory names of the offense." A recent case[10] holds that a criminal complaint which merely alleged that the employer required the employee to make an agreement not to remain a member of a labor organization did not state a criminal offense. The dictum of that case is the only authority which supports the principal case, for the court intimated that if coercion had been alleged a crime would have been charged. The following language is very pertinent: "Theoretically, the employer and employee are on an equality, so that one is free to employ, the other to accept the

[6] 129 Mo. 163 (1895).

[7] People v. Marcus, 185 N. Y. 257 (1906); State v. Bateman, 7 Ohio Nisi Prius 486 (1900), overruling Davis v. State, 30 Ohio W. L. B. 342 (1893); Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500 (1908); State v. Daniels, 136 N. W. Rep. 584 (Minn., 1912). The latter two cases deal with statutes which do not contain the words "coerce" or "compel."

[8] People v. Marcus, *supra.*

[9] State v. Bateman, *supra.*

[10] State v. Daniels, *supra.*

employment, as he sees fit; but in practice it is to the employee very often a matter of compulsion, and not of free choice . . . his necessities may easily be made use of as a means of coereion." Most courts refuse to recognize that economic pressure can be the means of coercion, relying upon the theoretical equality of employer and employee. The principal case reflects the important changes that are occurring in the industrial world. Laws of the state seeking to remedy evils and establish harmony between the classes should be upheld even where the liberty of the individual is subjected to certain restraints, provided such restraints are not arbitrary.[11]

I. B.

TORTS—DOCTRINE OF THE LAST CLEAR CHANCE—An interesting variation of the application of the so-called doctrine of the "last clear chance" is found in a recent decision of the Connecticut court of last resort. In *Nehring* v. *Connecticut Co.*[1] the plaintiff negligently placed himself in a dangerous position and carelessly continued to remain therein until he was injured by the defendant company, who, however, owing to gross negligence, failed to observe the plaintiff's situation until too late to avoid the injury. The Supreme Court, in a well-considered decision, held that the proximate cause of injury was the plaintiff's want of due care and not the lack of due care on the part of the defendant and accordingly, in offering a non-suit, declared that the doctrine of the "last clear chance" did not apply.

Few rules of law appear to be more difficult to apply correctly than this principle referred to. Fundamentally, it is the result of the revolt of the early nineteenth century courts against the hardship involved by the contributory negligence rule as it then existed and is predicated on the theory that an act of negligence or trespass committed by the plaintiff should not deprive him *ipso facto* of all rights to safety and security by removing all legal redress for whatever should subsequently befall him at the hands of the defendant. The theory just stated is clearly shown in the early leading cases of *Lynch* v. *Nurdin*[2] and *Bird* v. *Holbrook*;[3] and the doctrine of the "last clear chance" finally crystallized out in concrete form in the famous "donkey case" of *Davies* v.

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[11] In McLean v. Arkansas, 211 U. S. 539, 547 (1909), the court, in a decision sustaining an act requiring coal to be measured for payment of miners' wages before screening, said, "It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health and welfare of the people. It is also true that the police power of the State is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution."

[1] 84 Atl. Rep. 301 (Conn., 1912).
[2] 1 A. & E. (N. S.) 35 (1841).
[3] 4 Bing. 268 (1828).